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### Service of Process on Foreign Defendants: A Rule 4 Dilemma Seen in *Aries Ventures Ltd. V. Axa Finance, S.A.*

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# SERVICE OF PROCESS ON FOREIGN DEFENDANTS: A RULE 4 DILEMMA SEEN IN *ARIES VENTURES LTD. v. AXA FINANCE, S.A.*

## I. INTRODUCTION

Rule 4 of the Federal Rules of Civil Procedure (Rule 4) sets forth the means by which a district court plaintiff can serve process on a defendant.<sup>1</sup> Rule 4 provides a variety of ways by which a defendant may be effectively served. In an effort to ease the difficult task of serving a foreign defendant,<sup>2</sup> the federal rules are supplemented with section 4(i).<sup>3</sup> By providing five additional means of serving foreign defendants,<sup>4</sup> section 4(i) gives the plaintiff great flexibility in serving such defendants.<sup>5</sup> Although the Federal Rules of Civil Procedure (FRCP) do not specify that the mode of service used must not offend foreign law, some district courts have held that foreign norms of service may make service in accordance with the FRCP ineffective.<sup>6</sup>

Plaintiffs tend to rely on Rule 4 when choosing the mode of service they will use to serve a foreign defendant. Thus, confusion and added expense are inevitable when a district court, in spite of the plain language of the Rule 4, finds that service in accordance with the rule is ineffective. One district court has held that foreign law is wholly irrelevant with regard to the validity of service.<sup>7</sup> But this same court later held that the mode of service on a foreign defendant is ineffective if it offends norms of

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1. FED. R. CIV. P. 4.

2. In this Comment the word "foreign" will generally refer to a nation foreign to the United States, particularly Switzerland. This use of the word is not to be confused with its use to refer to an American state other than the one in which the district court sits.

3. FED. R. CIV. P. 4.

4. The five alternative means of service under Rule 4(i) are: (1) "in the manner prescribed by the law of the foreign country;" (2) "as directed by the foreign authority in response to a letter rogatory;" (3) "by delivery to the individual personally, and upon a corporation or partnership or association, by delivery to an officer, a managing or general agent;" (4) "by any form of mail, requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the party to be served;" and (5) "as directed by order of the court." FED. R. CIV. P. 4(i).

5. Advisory Committee Notes to Rule 4(i) as appearing in 12 C. WRIGHT & A. MILLER, *FEDERAL PRACTICE AND PROCEDURE*, 370, 371 (1973) [hereinafter 12 C. WRIGHT & A. MILLER].

6. *R.M.B. Electrostat, Inc. v. Lectra Trading, A.G.*, No. 82-1844, 1983 WL 13711 (E.D. Pa. Jan. 20, 1983).

7. *Alco Standard Corp. v. Benalal*, 345 F. Supp. 14, 26 (E.D. Pa. 1972).

service applicable in the foreign nation.<sup>8</sup> Unfortunately, the district court did not offer any basis for its change in view, and its internal conflict mirrors the overall confusion on the issue of whether foreign law must be considered in effectuating service under Rule 4.

A recent case confronting the issue of serving a foreign defendant is *Aries Ventures Ltd. v. Axa Finance, S.A.*<sup>9</sup> In *Aries Ventures*, the Swiss defendant thwarted service by not returning an acknowledgement of service,<sup>10</sup> prompting Aries Ventures to attempt service by Rule 4(i)(1)(D).<sup>11</sup> Aries Ventures was unable to complete service by this alternative because the district court clerk refused to mail the summons and complaint on the ground that Swiss law does not permit service by international mail.<sup>12</sup> Four days after the district court clerk refused to mail the summons and complaint, the district court granted, with prejudice, Axa Finance's motion to dismiss the complaint against it on the ground of improper service.<sup>13</sup> The question remaining after this dismissal is whether the court's ruling in *Aries Ventures* is based on a proper interpretation of the FRCP and international law.

This Comment will first examine the history and purposes of Rule 4 as it relates to the service of process on foreign defendants. It will then discuss the interplay of Rule 4 and the legal norms of foreign nations. It will also discuss the often conflicting goals of Rule 4, international law, and other factors the district courts may see as relevant in properly serving a foreign defendant. Finally, this Comment concludes that: (1) the district courts' emphasis on foreign law is repugnant to the goals of Rule 4; (2) Congressional modification of Rule 4 would be necessary if the district courts are expected to deem foreign law relevant; and (3) that such an amendment to Rule 4 is unwarranted be-

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8. *R.M.B. Electrostat*, No. 82-1844, 1983 WL 13711 (E.D. Pa. Jan. 20, 1983).

9. No. 86-4442, 1990 WL 37814 (S.D.N.Y. Mar. 30, 1990).

10. *Aries Ventures*, No. 86-4442, 1990 WL 37814 (S.D.N.Y. Mar. 30, 1990). Service on a foreign defendant through Rule 4(c)(2)(C)(ii) entails mailing the defendant a copy of the summons and complaint. Service is not complete until the defendant returns a form acknowledging receipt of service. FED. R. Civ. P. 4(c)(2)(C)(ii).

11. *Aries Ventures*, No. 86-4442, 1990 WL 37814 (S.D.N.Y. Mar. 30, 1990). Rule 4(i)(1)(D) provides that service on a foreign defendant may be completed by the district court clerk addressing the papers to be served and mailing them to the defendant by any form of mail requiring a signed receipt. FED. R. Civ. P. 4(i)(1)(D).

12. *Aries Ventures*, No. 86-4442, 1990 WL 37814, at \*2 (S.D.N.Y. Mar. 30, 1990).

13. *Id.* at \*1-\*4.

cause it is incompatible with the fundamental goals of the rule.

## II. BACKGROUND

### A. *The Relevant History of Rule 4*

In 1958 Congress created the Commission on International Rules of Judicial Procedure (the Commission).<sup>14</sup> The purpose of the Commission was to recommend legislation to make federal court procedures involving foreign service of documents "more readily ascertainable, efficient, economical, and expeditious."<sup>15</sup> This action by Congress was induced, in part, by the inability of operative federal statutes to effectively regulate the service of process on foreign defendants.<sup>16</sup> Indeed, the vast diversity of foreign defendants and law necessitated alternative methods of service. Alternative methods of service "would provide a fair amount of choice and flexibility while assuring that the foreign defendant would get good notice."<sup>17</sup>

The Commission ultimately set forth the text of Rule 4(i).<sup>18</sup> The text of Rule 4(i) remains virtually unmodified in the twenty-eight years since its adoption in 1963.<sup>19</sup> The caption of Rule 4(i), "Alternative Provisions for Service in a Foreign Country,"<sup>20</sup> demonstrates the nature of the provision. The rule, striving to give the district court plaintiff ample means to effectuate service on a foreign adversary, provides five special modes for the completion of service.<sup>21</sup> Compared to the provisions for service on domestic defendants, which must be done in compliance with Rule 4(c)<sup>22</sup> or Rule 4(d),<sup>23</sup> the rules for serving foreign de-

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14. Act of Sept. 2, 1958, 72 Stat. 1743.

15. *Id.*

16. Kaplan, *Amendments of the Federal Rules of Civil Procedure*, 77 HARV. L. REV. 601, 635 (1964) [hereinafter Kaplan].

17. *Id.*

18. *Id.* at 636.

19. *Id.* Rule 4(i) was amended in 1987 to remove the word "him," as it appeared in 4(i)(1)(C), and replace it with the gender-neutral word, "individual."

20. FED. R. CIV. P. 4(i).

21. *Id.* It is important to stress that the five methods of service enumerated in Rule 4(i) are not applicable to service on defendants in the United States, but are only applicable to service on foreign defendants. The highly debated application of various Rule 4 modes of service to foreign defendants which maintain subsidiaries within the United States is beyond the scope of this Comment. See *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694 (1988).

22. FED. R. CIV. P. 4(c) permits service on a defendant: (1) by a United States Marshal; (2) by applicable forum state law; and (3) by mail if service is acknowledged by the defendant.

defendants are more expansive. Service on a foreign defendant may be effectuated through any of the five alternate means of service set forth in Rule 4(i),<sup>24</sup> as well as through the modes of service set forth in Rule 4(c) and in Rule 4(d). The framers of the rules, when establishing multiple means of serving a domestic defendant,<sup>25</sup> thought it necessary to supplement these means with additional means when service is on a foreign defendant.

The goal of Rule 4 is to provide flexibility in the service of foreign defendants, and is patent in Rule 4(i)(1)(E).<sup>26</sup> This provision is extremely flexible, permitting service on the foreign defendant to be completed "as directed by order of the court."<sup>27</sup> The scope of this provision is limited only by the United States Constitution<sup>28</sup> and the ingenuity of judges and counsel.

### B. *The Purposes of Rule 4*

The Advisory Committee's (Committee) notes to Rule 4(i) manifest the intent behind the rule.<sup>29</sup> The Committee sought to "consolidate, amplify, and clarify the provisions governing" service upon foreign defendants.<sup>30</sup> The Committee notes emphasize these goals in light of the increasing amount of district court litigation involving foreign defendants.<sup>31</sup> The Committee points out that Rule 4(i), "introduces further flexibility by permitting . . . foreign service . . . in any of a number of . . . alternate ways."<sup>32</sup> It recognized the need for flexibility in the service of foreign defendants in light of the "difficulties [of such service] not encountered in . . . domestic service."<sup>33</sup> Such difficulties arise when foreign nations consider certain modes of service offensive to their

23. FED. R. CIV. P. 4(d) permits service on a defendant: (1) by personal delivery to an individual; (2) by personal delivery to certain agents of corporations and associations; and (3) through certain means if the defendant is an officer, agency, or body of the United States or a municipal entity. FED. R. CIV. P. 4(d).

24. *See supra* note 4.

25. In this Comment the word "domestic" refers to a defendant located within the United States, not to a defendant located within the district court's forum state.

26. FED. R. CIV. P. 4(i)(1)(E).

27. *Id.*

28. To conform with the due process clause of the United States Constitution, service must be "reasonably calculated" to actually notify the defendant of the pending action. *Mullane v. Central Hanover Bank and Trust Co.*, 339 U.S. 306, 314 (1950).

29. 12 C. WRIGHT & A. MILLER, *supra* note 5, at 370.

30. 12 C. WRIGHT & A. MILLER, *supra* note 5, at 370.

31. 12 C. WRIGHT & A. MILLER, *supra* note 5, at 370.

32. 12 C. WRIGHT & A. MILLER, *supra* note 5, at 371.

33. 12 C. WRIGHT & A. MILLER, *supra* note 5, at 371.

sovereignty.<sup>34</sup> These difficulties are enhanced by the uncertainty of predicting whether foreign law is offended and how various nations might respond to offenses. Indeed, the Committee cited nonenforcement of judgments and sanctions against process servers as potential threats to plaintiffs attempting to serve foreign defendants.<sup>35</sup> The Committee further stressed that the conflict of valid federal court service with foreign norms of service is an additional difficulty.<sup>36</sup>

Rule 4(i)(1)(D) was designed to make service on the foreign defendant "inexpensive and expeditious . . . requir[ing] a minimum of activity with the foreign country."<sup>37</sup> The Committee acknowledged that Rule 4 is intended to make the service of foreign defendants relatively straightforward and efficient. Rule 4 seeks to clarify the procedure for serving a foreign defendant,<sup>38</sup> and the alternate provisions of Rule 4(i)(1)(D) emphasize an intent to make the procedure extremely flexible.<sup>39</sup> More particularly, the rule was enacted to achieve four goals: (1) to ensure that service gives the foreign defendant actual notice; (2) to permit a plaintiff to efficiently serve a foreign defendant; (3) to set forth the means of serving a foreign defendant in a clear, discernable manner; and (4) to provide the plaintiff with the flexibility needed to achieve service in the diverse world of foreign defendants.<sup>40</sup>

The framers of Rule 4(i)(1) understood that service on a foreign defendant, done in compliance with the new rule, might conflict with the laws of the nation in which the defendant is served.<sup>41</sup> However, the framers of Rule 4 declined to qualify Rule 4(i)(1) with a provision that the mode of service utilized must not offend the law of the nation in which service is made.

The framers apparently believed that other factors of litigation would deter plaintiffs from offending foreign law. First, the Committee stressed that a judgment procured through a method of service offensive to foreign law is unlikely to be enforced in that foreign nation.<sup>42</sup> No prudent litigator would feel confident

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34. 12 C. WRIGHT & A. MILLER, *supra* note 5, at 371.

35. 12 C. WRIGHT & A. MILLER, *supra* note 5, at 371.

36. *See* 12 C. WRIGHT & A. MILLER, *supra* note 5, at 371.

37. 12 C. WRIGHT & A. MILLER, *supra* note 5, at 372.

38. 12 C. WRIGHT & A. MILLER, *supra* note 5, at 372.

39. 12 C. WRIGHT & A. MILLER, *supra* note 5, at 372.

40. *See* 12 C. WRIGHT & A. MILLER, *supra* note 5, at 370-73.

41. 12 C. WRIGHT & A. MILLER, *supra* note 5, at 371.

42. 12 C. WRIGHT & A. MILLER, *supra* note 5, at 371.

about collecting a judgment against assets in a foreign nation if the judgment is based on service which offends the law of that nation. The Committee further realized that certain methods of service condoned by Rule 4 would subject the serving party to sanctions in the foreign nation in which service was attempted.<sup>43</sup> The Committee believed that threats of potential unenforceable judgments and sanctions would entice district court plaintiffs to choose a form of service that "is likely to create [the] least objection" from the nation in which the service is made.<sup>44</sup>

### C. *The Need for Judicial Interpretation of Rule 4*

Since Rule 4 lacks a provision that service on a foreign defendant must not offend the law of the nation in which service is made, the judiciary must determine the effect of service made in accordance with Rule 4 but offensive to foreign law. Courts will continue to face this issue, since plaintiffs are not deterred by potential sanctions in a foreign nation if service is not made personally in that nation. More importantly, the threat of a district court judgment being unenforceable under foreign law is minuscule if the foreign defendant has assets in the United States against which a federal court judgment can be enforced.

The judiciary's response to this type of case has been unsatisfactory and has led to confusion and inefficiency in serving foreign defendants.<sup>45</sup> In addition, it has led to a general disregard of the significance of notice and the importance of flexibility in the service of process.<sup>46</sup> The judiciary has sacrificed the four premiere goals of Rule 4 in an effort to imply a consideration of foreign law that Congress did not include. By making foreign law relevant to the service of process on foreign defendants, certain district courts have read Rule 4 as if it contains a provision that foreign law, if inconsistent, invalidates service made in accordance with the plain language of the rule. Rule 4 does not contain a provision deferring to foreign law and should not be modified to make such a consideration relevant.

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43. 12 C. WRIGHT & A. MILLER, *supra* note 5, at 371.

44. 12 C. WRIGHT & A. MILLER, *supra* note 5, at 371.

45. See *Aries Ventures Ltd. v. Axa Finance S.A.*, No. 86-4442, 1990 WL 37814 (S.D.N.Y. Mar. 30, 1990). See *infra* notes 144-71 and accompanying text.

46. See *Aries Ventures*, No. 86-4442, 1990 WL 37814 (S.D.N.Y. Mar. 30, 1990). See *infra* notes 144-71 and accompanying text.

*D. Swiss Law on the Service of Process*

To understand the contrast between service of process under the laws of the United States and Switzerland,<sup>47</sup> it is necessary to realize that Switzerland is a civil-law nation. As opposed to common-law nations, such as the United States, civil-law nations tend to treat the service of a summons and complaint as a judicial act which can be carried out only by domestic government officials.<sup>48</sup>

The Swiss insistence on domestic governmental interference with foreign service of process is encouraged by Swiss public policy. Switzerland strives to be a neutral nation.<sup>49</sup> Perhaps the Swiss fear uncontrolled entrance of foreign judicial documents into Switzerland would endanger Switzerland's coveted neutrality. By allowing United States plaintiffs to freely pursue claims against Swiss inhabitants, Switzerland may fear that it is favoring United States interests and supporting United States law at the expense of its own nationals and of foreigners with assets in Switzerland.

The Swiss enunciate this sentiment as an aspect of their "extreme view of the nature of sovereignty."<sup>50</sup> Under the Swiss view of sovereignty, a judicial act of a foreign nation made in Switzerland is a blatant disregard of Swiss sovereignty.<sup>51</sup> The Swiss, offended by acts against their sovereignty, have been known to request apologies from the United States Department

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47. This Comment will analyze Rule 4 as it applies to serving a Swiss defendant in Switzerland. The application of Rule 4 to service done in Switzerland is not altered by the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, adopted Nov. 15, 1965, 20 U.S.T. 361, T.I.A.S. No. 6638, 658 U.N.T.S. 163, reprinted in FED. R. CIV. P., 28 U.S.C.A. (1990). Switzerland is not a party to the Hague Service Convention. For a listing of the signatures of the treaty, see *id.* If Switzerland and the United States were parties to a treaty which specified applicable means for serving defendants in Switzerland, such a treaty would trump Rule 4 as federal law. Further discussion of the interplay of the Federal Rules of Civil Procedure and the Hague Service Convention as that interplay affects service in signatory nations is beyond the scope of this Comment.

48. Degan & Kane, *The Exercise of Jurisdiction Over and Enforcement of Judgments Against Alien Defendants*, 39 HASTINGS L.J. 799, 836 (1988) [hereinafter Degan & Kane].

49. Miller, *International Cooperation in Litigation Between the United States and Switzerland: Unilateral Procedural Accommodation in a Test Tube*, 49 MINN. L. REV. 1069, 1074 (1965) [hereinafter Miller].

50. Horlick, *A Practical Guide to Service of United States Process Abroad*, 14 INT'L LAW. 637, 641 (1980) [hereinafter Horlick].

51. *Id.* at 641.



of State (State Department). for infractions.<sup>52</sup> By the Swiss concept of sovereignty, service by non-Swiss officials or by mail from a foreign nation is a patent violation of law.<sup>53</sup> The Swiss further argue that certain methods of service are a violation of customary international law.<sup>54</sup>

The extreme Swiss view of sovereignty is also influenced by Switzerland's staunch desire to protect commercial and industrial secrets.<sup>55</sup> Switzerland, renowned for the secrecy afforded to its bank accounts, places great importance in knowing the exact nature of summonses and complaints which are served in Switzerland.<sup>56</sup> In accordance with this perception, all summonses and complaints must filter through the Police Division of the Swiss Federal Department of Justice and Police before they are ultimately served on the Swiss defendant.<sup>57</sup> This procedure involves scrutiny of service related documents by the Swiss Department of Justice and Police (Department),<sup>58</sup> and the Department must approve all documents before service can be completed.<sup>59</sup> This procedure allows the Swiss Government not only to know the nature of foreign litigation, but also to thwart actions that it does not condone. This aspect of Swiss service contrasts patently with norms of service of process in the United States.

The Swiss view that service is offensive if not done through the Swiss Government is manifested in the Swiss Penal Code (*Strafgesetzbuch*).<sup>60</sup> Article 271(1) of the Swiss Penal Code provides that "whoever performs . . . acts for a foreign state on Swiss territory . . . will be punished by imprisonment."<sup>61</sup> Although this penal provision has not been applied to the service of a foreign summons and complaint in Switzerland,<sup>62</sup> the language of the provision permits such an application. Indeed, the

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52. Miller, *supra* note 49, at 1086.

53. Degan & Kane, *supra* note 48, at 841.

54. B. RISTAU, 1 INTERNATIONAL JUDICIAL ASSISTANCE: CIVIL AND COMMERCIAL 165 (1986) [hereinafter B. RISTAU]. Ristau questions this Swiss proposition. The existence of such a custom is undercut by the policies of nations, such as the United States, which permit international service by mail. Horlick, *supra* note 50, at 641; *see supra* note 4.

55. Miller, *supra* note 49, at 1076.

56. Miller, *supra* note 49, at 1076.

57. Miller, *supra* note 49, at 1076.

58. Miller, *supra* note 49, at 1076.

59. Miller, *supra* note 49, at 1076.

60. SWISS PENAL CODE at art. 271 (1). The Swiss Penal Code is the SCHWEIZERISCHES STRAFGESETZBUCH. INTRODUCTION TO SWISS LAW 6 (D. Wallace & T. Ansay eds. 1983).

61. 2 B. RISTAU, *supra* note 54, at 199.

62. Miller, *supra* note 49, at 1078.

Department has concluded that Article 271 applies to attempts to serve a defendant in Switzerland either personally or by mail.<sup>63</sup> Notably, Switzerland has utilized Article 271 in appropriate circumstances. For example, a German official was convicted and imprisoned for the offense specified in Article 271 after the official examined a Swiss corporation's records in accordance with a German proceeding.<sup>64</sup> Although the application of Article 271 is uncertain, the statute's presence in the Swiss Penal Code and its plain meaning serve as notice to the world of the Swiss law on service of process.

Although Swiss law makes federal court service of a Swiss defendant quite difficult, the completion of service in compliance with Swiss law is possible. By Swiss law, the only form of service in a foreign action which is effective against a Swiss defendant is letters rogatory.<sup>65</sup> Service through letters rogatory is a difficult and cumbersome process which involves a series of bureaucratic steps within and between the two involved nations.<sup>66</sup>

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63. Miller, *supra* note 49, at 1078.

64. *Kampfer v. Staatsanwaltschaft Zurich*, Bundesgericht, March 6, 1939, 65(I), S.B.G. 39.

65. Horlick, *supra* note 50, at 641.

66. Horlick, *supra* note 50, at 641-42. To complete service by letters rogatory, a lengthy series of steps must be followed. First, the letters rogatory must be prepared by the plaintiff and presented to the district court judge for signature. *Id.* at 640-41. Second, the district court judge must grant and sign the request. *Id.* at 641. Third, the district court clerk should affix the official seal of the court. *Id.* Fourth, the plaintiff must prepare two copies of the summons, complaint, and any other papers to be served. *Id.* With regard to the ultimate service on a Swiss defendant, the plaintiff must not only ascertain the canton (Swiss state) in which the defendant resides, but also must utilize the correct translation for that canton. Miller, *supra* note 49, at 1081. This task is significant because Swiss cantons may have French, German, or Italian as an official language. *Id.* at 1073. It is further recommended that the letters rogatory specify the defendant's relationship to the action and the nature of the action. 1 B. RISTAU, *supra* note 54, at 107. Fifth, the package of documents must be sent, with a check payable to the Swiss Embassy, to the Office of Special Consular Services of the United States Department of State. Horlick, *supra* note 50, at 641. Sixth, the letters rogatory and accompanying documents will be forwarded to the Swiss Federal Department of Justice and Police. Miller, *supra* note 49, at 1082. This department will then analyze the request for service to insure that the action or service does not offend Swiss law. *Id.* at 1076-77. Letters may be rejected by the department if: (1) service would impair Swiss sovereignty; (2) the proceeding offends Swiss notions of fundamental rights or natural justice; (3) the proceeding involves the breach of a military, political, or fiscal duty; (4) the proceeding punishes an act not a crime under Swiss law; or (5) the department feels that the United States courts have failed to give reciprocal treatment to Swiss courts. *Id.* at 1082. The department may further reject the letters on technical diplomatic grounds if the "proceeding is inconsistent with . . . [Swiss] public policy." 1 B. RISTAU, *supra* note 54, at 77. Seventh, the department will, at its broad discretion in light of Swiss public policy, forward the letters rogatory and related documents to the cantonal court of appropriate jurisdiction.

### E. *Interplay of Swiss Law and Rule 4*

Service through letters rogatory is time consuming and expensive.<sup>67</sup> Further, it is tainted with unpredictability due to the interjection of subjective Swiss public policy factors into the procedure.<sup>68</sup> Service by letters rogatory is, however, certain to satisfy Rule 4(i)(1)(B), which expressly makes such service a valid alternative means of serving a foreign defendant.<sup>69</sup>

The overlap of Swiss law and Rule 4 ends at Rule 4(i)(1)(B). Service in compliance with Rule 4(c)(2) involves either a process server representing United States courts or service by United States mail.<sup>70</sup> These means of service offend Swiss law and would not be honored by a Swiss Court.<sup>71</sup> Service by Rule 4(d)<sup>72</sup> would similarly offend the Swiss notion that only the Swiss Government can ultimately complete service within Switzerland.<sup>73</sup> Further, service by Rule 4(i)(1)(A) cannot be effective because Swiss law has procedures for foreign service and these procedures differ from Swiss domestic service procedures.<sup>74</sup> Rule 4(i)(1)(C)<sup>75</sup> is also offensive to Swiss law because it involves a person other than a Swiss official completing service by Swiss law, and a person acting to further foreign service without Swiss permission will be violating Swiss sovereignty and possibly the Swiss Penal Code.<sup>76</sup> Similarly, service by mail under Rule 4(i)(1)(D)<sup>77</sup> violates Swiss law in that such service bypasses Swiss diplomatic channels and, thus, does not accord with Swiss procedure. Finally, Rule 4(i)(1)(E),<sup>78</sup> or service by a court order, would offend Swiss law unless the district court orders service

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Miller, *supra* note 49, at 1082. The cantonal court will further scrutinize the request for service to insure that it does not offend Swiss public policy. *Id.* at 1082-83. Eighth, the cantonal court will serve the defendant, usually by mail. *Id.* at 1083.

67. *See id.*

68. *See id.*

69. FED. R. CIV. P. 4(i)(1)(B).

70. FED. R. CIV. P. 4(c)(2); *see supra* note 22.

71. *See supra* notes 47-66 and accompanying text.

72. FED. R. CIV. P. 4(d); *see supra* note 23.

73. *See supra* note 48 and accompanying text.

74. FED. R. CIV. P. 4(i)(1)(A). For a foreign litigant to effectively serve a defendant in Switzerland, mere compliance with Swiss domestic law for effectuating service is not sufficient. Swiss law sets forth means for serving domestic defendants, but the means can only be utilized by Swiss officials in response to a letter rogatory if the action is in a non-Swiss court. *See supra* note 66.

75. FED. R. CIV. P. 4(i)(1)(C); *see supra* note 4.

76. *See supra* notes 60-61 and accompanying text.

77. FED. R. CIV. P. 4(i)(1)(D); *see supra* note 4.

78. FED. R. CIV. P. 4(i)(1)(E); *see supra* note 4.

through letters rogatory, the only means of foreign service recognized by Swiss law.<sup>79</sup>

The overlap between Swiss law and Rule 4, the use of letters rogatory,<sup>80</sup> is so scant that district court plaintiffs seeking to comply with a Rule 4 provision are likely to find effective service blocked by Swiss law. This conflict gives rise to the issue in *Aries Ventures Ltd. v. Axa Finance, S.A.*,<sup>81</sup> and is the focus of this Comment.

#### *F. Service of Process on Foreign Defendants in Federal Court*

##### 1. Conflicting goals

Fundamental to the concept of service of process is the principle of notice.<sup>82</sup> In fact, the Committee emphasized the importance of notice in its notes on Rule 4(i),<sup>83</sup> specifically linking the importance of notice to service on foreign defendants. The federal courts evaluate methods of service by the standard that such methods must be "reasonably calculated" to inform the defendant of the pending action.<sup>84</sup> This standard applies to service of process on a foreign defendant in exactly the same way as it applies to service upon a domestic defendant.<sup>85</sup> The standard is subjective in that it considers the particular circumstances of a given suit; this is reflected in the "reasonably calculated" language of the standard.

Serving process on foreign defendants presents plaintiffs with political, cultural, and legal barriers that are generally not encountered in serving domestic defendants.<sup>86</sup> Rule 4, and more specifically, Rule 4(i), strive to give the plaintiff flexibility in serving foreign defendants in light of these barriers.<sup>87</sup> Rule 4 provides the plaintiff with several means of serving a foreign defendant in addition to those provided for service upon a domestic defendant.<sup>88</sup> Rule 4(i) creates five alternate methods of serv-

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79. See *supra* notes 47-66 and accompanying text.

80. FED. R. CIV. P. 4(i)(1)(B); see also *supra* note 65 and accompanying text.

81. No. 86-4442, 1990 WL 37814 (S.D.N.Y. Mar. 30, 1990).

82. See *supra* note 28; see also Horlick, *supra* note 50, at 637.

83. 12 C. WRIGHT & A. MILLER, *supra* note 5, at 372.

84. See *supra* note 28.

85. See, e.g., *Messinger v. United Canso Oil and Gas Ltd.*, 80 F.R.D. 730 (D.C. Conn. 1978).

86. See *supra* notes 33-36 and accompanying text.

87. See *supra* notes 21-28 and accompanying text.

88. Rule 4 sets forth several means of serving a defendant. Unlike the five provisions of 4(i), which apply only to service upon defendants in a foreign country, the other provi-

ing foreign defendants,<sup>89</sup> thereby giving the plaintiff added "choice and flexibility" in serving a foreign defendant.<sup>90</sup> This focus on flexibility in serving foreign defendants is internally enhanced by Rule 4(i)(1)(E), which permits a district court "to tailor the manner of service to fit the necessities of a particular case."<sup>91</sup> Indeed, Rule 4(i)(1)(E) encourages the plaintiff and the district court to work together to serve the foreign defendant in a reasonable way.

The FRCP also serve to establish and clarify the acceptable methods of service on a foreign defendant.<sup>92</sup> Congress initiated the drafting of Rule 4 in part to make acceptable methods of foreign service "more readily ascertainable."<sup>93</sup> The goal of clarifying methods of foreign service stemmed from general chaos in the procedural field of effectuating foreign service.<sup>94</sup> By carefully defining and listing several acceptable methods of serving process on a foreign defendant,<sup>95</sup> Rule 4 informs the district court and plaintiff what must be done to effectuate service upon a foreign adversary.

The goal of clarifying which means of service are acceptable closely relates to the goal of improving the efficiency of foreign service. Congress established the Commission that ultimately promulgated Rule 4(i) in an effort to make foreign service more "efficient, economical, and expeditious."<sup>96</sup> Congress recognized that ineffective attempts to serve a foreign defendant make pre-

sions may be utilized to serve both foreign and domestic defendants. Service may be achieved by: (1) delivery of the summons and complaint to "a person of suitable age and discretion" residing at the defendant's home, 4(d)(1); (2) delivery of the summons and complaint to an officer, manager, or agent of the corporation, 4(d)(3); (3) by mailing a copy of the summons and complaint to the defendant accompanied by the defendant's return of an acknowledgment of service by mail, 4(c)(2)(C)(ii); and (4) compliance with the law of the forum state in which the district court sits, 4(c)(2)(C)(i). FED. R. CIV. P. 4.

89. See *supra* note 4.

90. *Levin v. Ruby Trading Corp.*, 248 F. Supp. 537, 540 (S.D.N.Y. 1965). The district court in *Levin* takes this proposition from Kaplan, *supra* note 16, at 635.

91. *New England Merchants National Bank v. Iran Power Generation and Transmission Co.*, 508 F. Supp. 49, 52 (S.D.N.Y. 1980) (authorizing service of foreign defendant by plaintiff on the basis of flexibility provided for under Rule 4, allowing substituted service); see FED. R. CIV. P. 4(i)(1)(E).

92. Rule 4 allows a foreign defendant to be served by the specified means of serving a domestic defendant or by the five alternative provisions in Rule 4(i). FED. R. CIV. P. 4. See *supra* notes 4 and 88.

93. Act of Sept. 2, 1958, 72 Stat. 1743.

94. See generally Jones, *International Judicial Assistance: Procedural Chaos and a Program for Reform*, 62 YALE L.J. 515 (1963).

95. See *supra* notes 4, 88 and 92.

96. Act of Sept. 2, 1958, 72 Stat. 1743.

trial litigation drag on. If service is ineffective, the district court is likely to quash service and direct the plaintiff to serve the foreign defendant properly within a reasonable time.<sup>97</sup> By following well-defined guidelines for the service of process on a foreign defendant and giving full effect to service made in accordance with Rule 4, the federal district courts can conserve valuable judicial time.

The federal courts have an interest in: (1) seeing that the defendant has notice of the action; (2) providing the plaintiff with flexible means of achieving service on the foreign defendant; (3) clarifying which modes of service are acceptable; and (4) promoting the efficiency of service and decisions related thereto. However, these important goals often conflict with the goal of upholding international comity. Offending a foreign nation's sovereignty disrupts international comity. Offended nations not only might complain to the State Department,<sup>98</sup> but also might respond with sanctions against the United States. While sanctions could be limited to declining to assist the United States judiciary, they could also be broader and could feasibly be explicitly directed against the interests of the United States.

District courts are thus confronted with the reality of considering comity with foreign nations when a plaintiff sues a foreign defendant. Although an interest in comity does not bind a court to any decision in a case, courts must "be aware of the possible foreign relations impact of encroachments on . . . [foreign] sovereignty."<sup>99</sup> Therefore, in the interest of not offending foreign nations, district courts sometimes look to foreign norms of service.<sup>100</sup> By nullifying service of process which seems likely to offend foreign law, the district courts deter such offensive service and avoid infringements on the sovereignty of foreign nations, thus furthering comity considerations.

In sum, a focus on notice, flexibility, clarity, and efficiency in effectuating service against a foreign defendant brings application of Rule 4 into conflict with a district court's consideration of comity with foreign nations. This conflict has led to conflict-

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97. See, e.g., *Aries Ventures Ltd. v. Axa Finance S.A.*, 729 F. Supp. 289, 303 (S.D.N.Y. 1990).

98. Miller, *supra* note 49, at 1086.

99. *Hudson v. Capital Management International, Inc.*, No. 81-1737, 1982 WL 1384 (N.D. Cal. Jan. 6, 1982).

100. *Id.*

ing decisions in the district courts.<sup>101</sup>

## 2. Federal Courts Holding Foreign Law as Irrelevant

Some courts have concluded that foreign law on the service of process is irrelevant when the FRCP are applied.<sup>102</sup> In *Alco Standard Corp. v. Benalal*,<sup>103</sup> the district court held that Spanish law was irrelevant and that "the only relevant question . . . [was] the sufficiency of the service of process under the laws of [the] *United States*" (emphasis in original).<sup>104</sup> The district court disregarded the fact that service was not by an official clerk of a Spanish court as was required by Spanish law.<sup>105</sup> Instead, the district court held that personal service under Rule 4(i)(1)(C) was sufficient.<sup>106</sup> The court emphasized that any judgment obtained may be unenforceable in Spain, but held that the potential problems in enforcing the judgment in Spain had no bearing on the effectiveness of the service.<sup>107</sup>

A similar holding is seen in *Securities and Exchange Commission v. International Swiss Investments Corp.*<sup>108</sup> In *International Swiss*, the Securities and Exchange Commission<sup>109</sup> personally served the defendants in Mexico, thus complying with Rule 4(i)(1)(C) and, due to a court order, Rule 4(i)(1)(E).<sup>110</sup> The circuit court rejected the argument that the service violated international law as the "exercise of . . . [United States] sovereignty within . . . the territory of" Mexico.<sup>111</sup> The court reasoned that service of a summons and complaint provides notice to the foreign defendant of a pending action and is not compulsory process which, in dictum, might violate Mexican sovereignty.<sup>112</sup>

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101. See *supra* notes 7-8 and accompanying text.

102. *Alco Standard Corp. v. Benalal*, 345 F. Supp. 14 (E.D. Pa. 1972).

103. *Id.*

104. *Id.* at 26.

105. *Id.*

106. *Id.* at 26-27.

107. *Id.* at 26-27.

108. 895 F.2d 1272 (9th Cir. 1990).

109. For purposes of this Comment, governmental bodies created by statute, such as the Securities and Exchange Commission, will be treated as analogous to an individual district court plaintiff. These governmental bodies often seek to serve summonses and complaints on foreign defendants under Rule 4 as is permitted by Rule 4(e). FED. R. CIV. P. 4(e).

110. *International Swiss*, 895 F.2d at 1275.

111. *Id.* at 1276.

112. *Id.*

Both the *Alco Standard* and *International Swiss* courts focused on the plaintiff's compliance with Rule 4(i). Once compliance with the rule was shown, the courts regarded service of process as being completed. No resort to foreign law was made, and the effectiveness of service was wholly decided by the terms of Rule 4. Since Rule 4 does not specify that the mode of service utilized must not offend foreign law, such holdings are not surprising and are in accordance with the plain language of Rule 4.

### 3. Federal Courts Holding Foreign Law As Relevant

Some federal courts have concluded that the laws of the nation in which service of process is made are relevant.<sup>113</sup> For example, in *Hudson v. Capital Management International, Inc.*,<sup>114</sup> the district court placed great significance on foreign law. In *Hudson*, the Swiss defendant was served by mail, a violation of Swiss law and Swiss concepts of sovereignty.<sup>115</sup> The district court held that service on the Swiss defendant must be done "in a matter that does not offend Swiss law."<sup>116</sup> The district court emphasized that a failure to comply with Swiss law is likely to make a district court judgment unenforceable against the Swiss defendant's assets in Switzerland.<sup>117</sup> The court also emphasized a concern that offending Swiss law might have adverse diplomatic ramifications.<sup>118</sup>

Similarly, in *R.M.B. Electrostat, Inc. v. Lectra Trading, A.G.*,<sup>119</sup> the district court held that, regardless of compliance with Rule 4, service that offends foreign law is ineffective.<sup>120</sup> As in *Hudson*, the plaintiff attempted to serve a Swiss defendant by mail. The court dismissed the complaint, indicating that service against the Swiss defendant may only be achieved by letters

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113. *R.M.B. Electrostat, Inc. v. Lectra Trading, A.G.*, No. 82-1844, 1983 WL 13711 (E.D. Pa. Jan. 20, 1983).

114. No. 81-1737 1982 WL 1384 (N.D. Cal. Jan. 6, 1982).

115. *Hudson*, No. 81-1737, 1982 WL 1384, at \*11. See *supra* notes 47-66 and accompanying text.

116. *Hudson*, No. 81-1737, 1982 WL 1384, at \*12.

117. *Id.* at \*11.

118. *Id.* at \*12. See *supra* note 99 and accompanying text. Such adverse ramifications potentially involve Swiss demands for apologies from the Department of State and could ultimately lead to Swiss reluctance to honor letters rogatory from United States courts.

119. No. 82-1844, 1983 WL 13711 (E.D. Pa. Jan. 20, 1983).

120. *Id.* at \*2.



rogatory.<sup>121</sup>

The *R.M.B. Electrostat* opinion pointed out that the Administrative Office of the United States Courts had issued a directive in response to Swiss complaints about attempted service by mail into Switzerland.<sup>122</sup> Memoranda and directives of this type inform district court clerks which nations have lodged protests with the State Department objecting to service by mail.<sup>123</sup> In accordance with such directives or memoranda, district courts have issued instructions to their clerks not to dispatch summonses and complaints by mail, in compliance with Rule 4(i)(1)(D), to certain nations.<sup>124</sup> Pursuant to these instructions, district court clerks have refused to address and mail summonses and complaints to Swiss defendants and have notified plaintiffs that service must be done by letters rogatory.<sup>125</sup>

In a spirit related to the interest in comity recognized in *Hudson* and *R.M.B. Electrostat*, in *Federal Trade Commission v. Compagnie de Saint-Gobain-Pont-Mousson*,<sup>126</sup> the Court of Appeals for the District of Columbia held that international law forbids the service of an administrative subpoena in France.<sup>127</sup> The court held that the United States, if the summons were served, would be enforcing its jurisdiction in violation of foreign law.<sup>128</sup>

In contrast with these decisions, some district courts disregard foreign law and hold service proper if it complies with Rule 4.<sup>129</sup> It is with the backdrop of these two conflicting federal court views that the relevant issue in *Aries Ventures* arose.

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121. *Id.* at \*3.

122. *Id.* at \*2.

123. *Memorandum to All Clerks, United States District Courts*, from L.R. Mecham, Director of the Administrative Office of the United States Courts. May 23, 1990.

124. See, e.g., *Instructions for Service of Process on a Foreign Defendant Pursuant to FRCP, 4(i) and the Foreign Sovereign Immunities Act*, Raymond F. Burghardt. S.D.N.Y., 12/89 revision.

125. *Id.*

126. 636 F.2d 1300 (D.C. Cir. 1980).

127. *Id.* at 1317.

128. *Id.*

129. See *Alco Standard Corp. v. Benalal*, 345 F. Supp. 14 (E.D. Pa. 1972); *S.E.C. v. International Swiss Investments Corp.*, 895 F.2d 1272 (9th Cir. 1990).

III. *ARIES VENTURES LTD. v. AXA FINANCE, S.A.*A. *Facts*

The plaintiff, Aries Ventures, allegedly loaned various sums of money to Axa Capital, an agent of Axa Finance.<sup>130</sup> Coplaintiff, an attorney, provided legal services for Axa Finance.<sup>131</sup> The suit was initiated to recover the loans and legal fees under a "variety of legal theories."<sup>132</sup> Axa Finance, the defendant, was a Swiss corporation with its principle place of business in Switzerland.<sup>133</sup>

B. *Court Proceedings and the Service of Process*

Aries Ventures brought suit in the district court for the Southern District of New York based upon diversity jurisdiction.<sup>134</sup> In initiating the suit, Aries Ventures attempted to serve Axa Finance by mailing a copy of the summons and complaint to Axa Finance's sole officer and director.<sup>135</sup> By mailing the papers to the director's address in Switzerland, Aries Ventures sought to complete service by Rule 4(c)(2)(C)(ii). Under this section, service is mailed to the defendant, but is not completed until the defendant acknowledges service by signing and returning an acknowledgement of service form.<sup>136</sup> Axa Finance did not acknowledge service by returning the form.<sup>137</sup>

Realizing that service upon Axa Finance had not been completed since the defendant failed to acknowledge service, Aries Ventures sought to effect service through Rule 4(i)(1)(D).<sup>138</sup> Under this section, service is accomplished by the district court clerk addressing and mailing the summons and complaint to the defendant through a mailing requiring a signed receipt.<sup>139</sup> Plaintiff presented the summons and complaint to the district court clerk, but the clerk refused to mail the papers on the ground

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130. *Aries Ventures Ltd. v. Axa Finance S.A.*, 729 F. Supp. 289, 293 (S.D.N.Y. 1990).

131. *Id.*

132. *Id.*

133. *Id.* at 292.

134. 28 U.S.C. § 1332 (1990). This section confers diversity jurisdiction on the Federal District Courts.

135. *Aries Ventures*, 729 F. Supp. at 293; *Aries Ventures Ltd. v. Axa Finance, S.A.*, No. 86-4442, 1990 WL 37814, at \*2 (S.D.N.Y. Mar. 30, 1990).

136. FED. R. CIV. P. 4(c)(2)(C)(ii).

137. *Aries Ventures*, No. 86-4442, 1990 WL 37814, at \*2.

138. *Id.*

139. FED. R. CIV. P. 4(i)(1)(D).

that such service offended Swiss law.<sup>140</sup>

Four days after the district court clerk refused to mail the summons and complaint to Axa Finance, the district court granted Axa Finance's motion to dismiss plaintiffs' action, with prejudice, for lack of proper service of the summons and complaint.<sup>141</sup>

### C. Holding

The district court, in dismissing the action in *Aries Ventures*, held that a district court plaintiff may not serve a Swiss defendant through Rule 4(i)(1)(D).<sup>142</sup> The court stated that service of process made in a foreign nation must not offend that foreign nation's laws concerning the service of process.<sup>143</sup>

## IV. ANALYSIS

### A. *Aries Ventures* disregards the fundamental goals of the Rule 4

#### 1. Notice

The decision in *Aries Ventures* disregarded the fundamental basis of Rule 4. Rule 4 is designed, in part, to achieve a function basic to any system for the service of process; that being to give the defendant notice of the action.<sup>144</sup> Arguably, all other functions and technicalities of Rule 4 are secondary to the consideration of notice. In *Aries Ventures*, Axa Finance had actual notice of the action pending against it; in fact, Axa Finance had been actively litigating against the action for three years.<sup>145</sup> Furthermore, the sole officer of Axa Finance was previously deposed and the summons and complaint was mailed to his address.<sup>146</sup>

By not acknowledging receipt of service by mail, it appears as if Axa Finance, knowing the contents of the action against it, was merely avoiding service on technical grounds. Such avoidance is in direct opposition to the Second Circuit's opinion in

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140. *Aries Ventures*, No. 86-4442, 1990 WL 37814, at \*2; see *supra* notes 123 and 124 and accompanying text.

141. *Aries Ventures*, No. 86-4442, 1990 WL 37814, at \*4.

142. *Id.* at \*3.

143. *Id.*

144. Horlick, *supra* note 50, at 637.

145. *Aries Ventures Ltd. v. Axa Finance S.A.*, 729 F. Supp. 289, 303 (S.D.N.Y. 1990).

146. *Aries Ventures Ltd. v. Axa Finance S.A.*, No. 86-4442, 1990 WL 37814, at \*2 (S.D.N.Y. Mar. 30, 1990).

*International Controls Corp. v. Vesco*,<sup>147</sup> where the court severely criticized the conduct of a foreign defendant who knew of the contents of the action against him, but repeatedly sought to avoid service on technical grounds.<sup>148</sup>

In contrast, the district court in *Aries Ventures* places little emphasis on the fact that Axa Finance knew the substance of the action pending against it. The court instead relies on Swiss law to uphold a court clerk's denial to complete official service.<sup>149</sup> Thus, with regard to notice, the *Aries Ventures* opinion places form over substance. Indeed, notice, the fundamental goal of Rule 4 procedures for service, was effectuated. Despite this, foreign law, a factor not within the language of Rule 4, became paramount and prevented the district court clerk from serving Axa Finance by mailing the summons and complaint.<sup>150</sup>

## 2. Flexibility

The *Aries Ventures* court undermined the concept of flexibility that Rule 4(i) seeks to give plaintiffs suing foreign defendants. The Committee emphasized this need for flexibility in its note,<sup>151</sup> and Rule 4(i) fulfills the need by making four additional modes of service effective, and by permitting compliance with court orders to be a fifth, particularly flexible, effective mode of service.<sup>152</sup>

After Axa Finance refused to acknowledge receipt of service by mail under Rule 4(c)(2)(C)(ii),<sup>153</sup> *Aries Ventures* relied upon the apparent flexibility of Rule 4(i) to effect service. By negating *Aries Ventures*' attempt to fulfill service by mailing through the court clerk under Rule 4(i)(1)(D), the district court essentially locked *Aries Ventures* into service by letters rogatory under Rule 4(i)(1)(B).<sup>154</sup> The court disregarded that Rule 4(i) was intended to provide a reservoir of effective means of service from which the plaintiff could choose to fit the needs of serving a particular foreign adversary. The district court in *Aries Ventures* read a consideration of foreign law into Rule 4, and this judicial

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147. 593 F.2d 166 (2d. Cir. 1979).

148. *Id.* at 174.

149. *Aries Ventures*, No. 86-4442, 1990 WL 37814, at \*2-\*4.

150. *Id.* at 2. See *supra* note 140 and accompanying text.

151. 12 C. WRIGHT & A. MILLER, *supra* note 5, at 371.

152. FED. R. CIV. P. 4(i).

153. *Aries Ventures*, No. 86-4442, 1990 WL 37814, at \*2.

154. *Id.* at \*3.

construction constricts the options available to district court plaintiffs. Thus, the fundamental flexibility the authors saw as basic to the rule is greatly curtailed.

### 3. Efficiency

Rule 4 also seeks to make the service of process on a foreign defendant more efficient.<sup>155</sup> If service of process is not done properly early in the litigation, the district court may have to dismiss the case on grounds of improper service and the merits of the case will not be reached. Such a dismissal is a waste of valuable judicial time. This waste is demonstrated in *Aries Ventures*, where three years of litigation, including depositions, a summary judgment motion, and various discovery motions were cast aside on a service of process technicality.<sup>156</sup>

Thus, *Aries Ventures* does not make the service of process efficient. The holding forces plaintiffs to comply with foreign law and makes reliance on the readily ascertainable language of Rule 4 inherently dangerous. The holding further allows foreign defendants to avoid service by using technical norms and interpretations of foreign law to attack service of process. The plaintiffs' scramble to satisfy the district court's rigid, technical service requirements and the defendant's scramble to avoid service of process is a time-consuming waste of judicial resources.

For these reasons, it is important that courts hold plaintiffs to the procedures that are set out for the service of process. To do so, the district court must consider whether the mode of service used complies with the provisions of Rule 4. It is not necessary for the court to deem certain modes of service ineffective due to foreign law, because the consideration of foreign law negates otherwise valid service and impedes judicial economy by forcing the district court to continually scrutinize foreign law and to dismiss actions in which considerable judicial time has been invested.

### 4. Clarity

The *Aries Ventures* holding further undermines the objectives of Rule 4 by reducing the clarity of the rule as it relates to foreign defendants. The holding forces courts and litigants to

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155. See 12 C. WRIGHT & A. MILLER, *supra* note 5, at 370.

156. See *supra* notes 130-41 and accompanying text.

look to foreign law, an extrinsic factor, to evaluate service of process. Rule 4(i)(1)(A) requires consideration of foreign law because it allows service of process on a foreign defendant in compliance with foreign law.<sup>157</sup> Other than with regard to Rule 4(i)(1)(A), Rule 4(i) seems to operate independently of foreign law considerations. This independence makes the requirements for service of process readily ascertainable and permits a concise evaluation of the plaintiff's attempt to effect service. Under this straightforward analysis, if service complies with the rules it is effective. In this way, litigants and courts will know what to expect and will be able to act accordingly. By importing an analysis of foreign law into all aspects of Rule 4, the *Aries Ventures* court destroys the internal operation of Rule 4 and undermines the clarity and predictability of the rule.

*B. Aries Ventures Encourages International Comity*

By requiring plaintiffs to serve foreign defendants in Switzerland through letters rogatory, *Aries Ventures* discourages modes of service that the Swiss Government finds offensive.<sup>158</sup> The federal government has an interest in not offending the laws of foreign nations. As barriers within the community of world nations are destroyed and the United States interest in foreign investments and affairs grows, the United States faces the continuing challenge of maintaining working relations with foreign nations. A spirit of international comity enhances the United States position in dealing with foreign nations and, additionally, enhances the international business climate for United States businesses.

Realizing the significance of international comity, *Aries Ventures* follows the tendency to nullify service of process that is offensive to foreign law.<sup>159</sup> The Swiss Government perceives an interest in screening foreign judicial documents which come into its territory so that it can thwart those actions which have the potential of adversely affecting Swiss interests and policies.<sup>160</sup> By nullifying service of process in Switzerland which is not done through letters rogatory, the district courts uphold the Swiss governmental preference. This rejection of the modes of

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157. FED. R. CIV. P. 4(i)(1)(A).

158. *Aries Ventures*, No. 86-4442, 1990 WL 37814, at \*3.

159. See *supra* notes 113-28 and accompanying text.

160. See *supra* notes 47-59 and accompanying text.

service that offend Swiss law paves the way for increased judicial cooperation between the governments of the United States and Switzerland. Judicial cooperation is a significant aspect of any real comity that can exist between the two nations. Therefore, district courts may be reluctant to upset judicial cooperation with Switzerland or to undermine the legitimate national interest in achieving and maintaining a strong international relationship with Switzerland.<sup>161</sup> Establishing a degree of international comity is an important national goal and the holding in *Aries Ventures* encourages the achievement of that goal.

*C. The Court Usurps a Decision Rule 4 Left for the Plaintiff*

The Committee's notes to Rule 4 recognize that a plaintiff who serves process on a foreign defendant in violation of foreign law takes the risk that any ensuing district court judgment would be unenforceable by the foreign courts.<sup>162</sup> This risk naturally deters plaintiffs from serving defendants in violation of foreign law. With the quality of the potential judgment in mind, a plaintiff is fully able to consider factors which affect how process should be served. The authors of Rule 4 knew of the situation facing plaintiffs and apparently felt that the risk of a useless judgment would hold plaintiffs to abiding by foreign law in cases where such an observance was appropriate.

In some instances, the plaintiff will resort to service which violates foreign law in spite of the potential judgment's limited enforceability. If the foreign defendant has assets located in the United States, the inability to enforce the judgment in a foreign court becomes much less significant. Furthermore, if the foreign nation is unlikely to cooperate with the plaintiff's attempts to serve the defendant, the options of process through foreign authorities or through letters rogatory become much less appealing. Also, the costs, in time and money, of certain forms of service make those forms of service appropriate only in certain cases. After considering these factors and other factors unique to the plaintiff's case, a plaintiff may well decide that service which is valid in the federal courts alone is the most appropriate mode of service for the action. It is unlikely that Rule 4 was intended to deprive the district court plaintiff of this choice in litigation.

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161. *Hudson v. Capital Management International, Inc.*, No. 81-1737, 1982 WL 1384, at \*12 (N.D. Cal. Jan. 6, 1982).

162. See 12 C. WRIGHT & A. MILLER, *supra* note 5, at 371.

Nor was the rule intended to ensure that all judgments handed down by each district court would be enforceable in all nations of the world. Such an objective is impossible to attain. By refusing to permit service of process in violation of foreign law, *Aries Ventures* prevents the plaintiff from balancing the factors specific to each case. Rule 4 is intended to give the plaintiff options as to how service on a foreign defendant can be effectuated.<sup>163</sup> The *Hudson* and *R.M.B. Electrostat* decisions strip the plaintiff of any meaningful choice on the method of service and, in cases where Swiss defendants must be served, prescribe the only means of service which will be considered effective.<sup>164</sup>

#### D. Other Policy Considerations

##### 1. Customary International Law

In international law, the actions of a state in the interplay of nations are highly significant because such actions can serve to establish customary international law. By permitting service of process in violation of foreign law or by refusing to give effect to such service in its courts, the federal district courts act for the United States in its role as a subject of international law. Indeed, courts are an important means of ascertaining how a state is acting on the plane of international law.<sup>165</sup> A great portion of international law is established by custom,<sup>166</sup> and thus, states may become bound by certain practices if they carry out such practices systematically and do so out of a sense of legal obligation.<sup>167</sup> Once a custom is established in international law, states are bound to act in accordance with the custom.<sup>168</sup>

Switzerland believes that serving process offensive to the foreign nation in which service is made constitutes a violation of customary international law.<sup>169</sup> By declaring such service ineffective in the federal courts, the district courts are following, out of a sense of legal obligation, the same legal custom. The district court decisions in *Hudson* and *R.M.B. Electrostat* act as building blocks toward establishing a norm of customary interna-

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163. See *supra* notes 4 and 84.

164. See *supra* notes 113-21 and accompanying text.

165. See generally J. STARKE, INTRODUCTION TO INTERNATIONAL LAW 37 (10th ed. 1989).

166. *Id.* at 36.

167. See generally *id.* at 38.

168. *Id.* at 36.

169. See 1 B. RISTAU, *supra* note 54, at 165.



tional law. Such building blocks are the first step of a two step process. As the United States courts assert through their decisions that service may not offend foreign law, for purposes of international law the United States arguably joins the group of states which systematically reject such service out of a sense of legal obligation. If the trend set by *Hudson* and *R.M.B. Electrostat* becomes the dominant policy of the federal courts and other nations act similarly to create a customary norm, the United States, as well as other nations, may face the consequences of being bound to a norm of customary international law.

The decisions in *Alco Standard* and *International Swiss* undercut United States observance of the norm that service must not offend the foreign nation in which service is made. Thus, the future decisions of the district courts have the potential to either bind the United States to a customary norm of international law or to exclude the United States from any formation of such a norm.

## 2. Discouragement of District Court Actions

It is well known that litigation does not always continue until a final judgment is rendered; much litigation is settled by the parties before a verdict is received. Also, the rigors and complexities of international litigation may have a tendency to prevent some injured plaintiffs from pursuing redress in the federal courts. The decisions in *Hudson* and *R.M.B. Electrostat* serve to give certain foreign defendants an advantage in settlement negotiations and, furthermore, serve to deter litigation against those defendants. Since plaintiffs faced with serving a foreign adversary cannot, under these holdings, be confident that service in accordance with Rule 4 will be satisfactory, such plaintiffs may be forced to accept unfair settlements or to relinquish their claim in the district court altogether. This outcome flows from the insistence that service be effectuated through letters rogatory. The ultimate effect of letters rogatory is unpredictable because a foreign government will screen the request for objections to what it perceives as international interests.<sup>170</sup> Swings in foreign relations or shifts in foreign governmental control can further make service of process through letters rogatory unpredictable. Service made in compliance with Rule 4 is inherently more

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170. See *supra* notes 57-59 and accompanying text.

predictable and has less of an effect of discouraging plaintiffs from maintaining suits against foreign defendants.

### 3. Complexities Related to Foreign Law

By placing an emphasis on foreign law, district courts are faced with the question of what the content of the applicable foreign law is. Such legal concerns are difficult to answer, and district courts will be forced to ascertain foreign law through expert testimony, briefs of counsel, and by independent research. This analysis of foreign law was not contemplated by the authors of Rule 4.<sup>171</sup> Additionally, the use of judicial resources to ascertain foreign law as it relates to the service of process could impair judicial economy and serve to remove the court's attention from the merits of cases.

Finally, decisions that require service of process not to offend foreign law may encourage foreign nations to enact statutes which thwart service upon their nationals in district court actions. If federal courts consider foreign laws on service relevant, such foreign law could be applied in the district courts to nullify otherwise legitimate service on a foreign defendant.

## V. CONCLUSION

*Aries Ventures* contributes to the conception that service on a foreign defendant must not offend foreign law. The *Aries Ventures* court cites a synopsis of Swiss law from a practice commentary,<sup>172</sup> but fails to address the fundamental goals of Rule 4 or to explain how Rule 4 becomes subject to foreign law. The court's decision serves to emphasize the inconsistency of the *Hudson* and *R.M.B. Electrostat* interpretations of Rule 4 with the goals of the rule as it relates to the service of process on foreign defendants.<sup>173</sup> While establishing a degree of international comity and potentially influencing customary international law, the *Aries Ventures* line of holdings: (1) neglect the significance of the defendant's actual notice of the suit; (2) apply Rule 4 in a rigid manner; (3) lead to ineffective service of process; and (4) confuse plaintiffs as to how service should be made.

These consequences thwart Rule 4's objectives because the

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171. See 12 C. WRIGHT & A. MILLER, *supra* note 5, at 370-73.

172. *Aries Ventures Ltd. v. Axa Finance S.A.*, No. 86-4442, 1990 WL 37814, at \*3 (S.D.N.Y. Mar. 30, 1990).

173. See *supra* notes 29-46 and accompanying text.

court assumes a role better left to the plaintiff's initial litigation strategy choices. Service of process which offends foreign law is inherently deterred when the plaintiff seeks a judgment that may not be enforceable in a foreign nation. The framers of Rule 4 seemed to perceive this as a sufficient deterrent to service offensive to foreign nations and chose not to qualify the rules for service by requiring service that does not offend foreign law.<sup>174</sup> The court's reading of such a provision into Rule 4 is the unwarranted assumption of a legislative role by the *Aries Ventures* court. If Rule 4 is to be construed to mandate consideration of foreign law, the language of the rule should reflect this consideration. Such an alteration of Rule 4 must be achieved through Congressional approval, and should not be achieved by haphazard constructions and qualifications by the district courts. However, in light of the importance of the original goals of Rule 4, the rule should not be amended by Congress. Such an amendment would remove the rule's prime focus on giving notice to the foreign defendant and would make the rules so rigid, unclear, and ineffective that plaintiffs would be unjustly obstructed in efforts to recover just compensation from foreign defendants.

Finally, the *Aries Ventures* holding establishes a policy that the federal courts will consider foreign law in evaluating service of process. This policy has ramifications in international law and in plaintiffs' efforts to maintain actions.

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174. See 12 C. WRIGHT & A. MILLER, *supra* note 5, at 371.